No. 75-748

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A) is reported at 519 F. 2d 1215. The panel opinion of the court of appeals (Pet. App. B) is reported at 519 F. 2d 1200. The opinion of the Occupational Safety and Health Review Commission (Pet. App. C) is reported at 4 OSAHRC 1. The opinion and order of the Administrative Law Judge (Pet. App. D) are reported at 4 OSAHRC 8.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1975 (Pet. App. 24a–25a). On October 14, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 21, 1975, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the monetary "civil penalties" that may be administratively assessed under Section 17 of the Occupational Safety and Health Act of 1970, 84 Stat. 1606, 29 U.S.C. 666, are criminal fines, and thus violate the Sixth Amendment to the Constitution by failing to accord an employer the right to a trial by jury prior to imposition.

2. Whether, if such penalties are civil, the Occupational Safety and Health Act of 1970 violates the Seventh Amendment to the Constitution by providing administrative fact-finding of violations with judicial review on a substantial evidence basis in the court of appeals, rather than a trial by jury in the district court.

STATEMENT

1. THE STATUTORY SCHEME

The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions * * *." 29 U.S.C. 651. See generally *Brennan* v.

Butler Lime and Cement Co., 520 F. 2d 1011 (C.A. 7); *Brennan* v. *Occupational Safety and Health Commission*, 513 F. 2d 553 (C.A. 10); *National Realty and Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1260–1261 (C.A.D.C.). The Act is administered by the Department of Labor, whose inspectors are authorized to conduct safety and health inspections, at reasonable times and in a reasonable manner, at places of employment. 29 U.S.C. 657(a). If upon inspection or investigation the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a penalty. 29 U.S.C. 658, 659.

The amount of the proposed penalty is dependent upon the severity of the hazard and the employer's diligence in attempting to correct it. 29 U.S.C. 659(a), 666(i) and (j). These assessments are expressly denominated as "civil" and may range from zero for *de minimis* or nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)–(c) and (j). The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final order, 29 U.S.C. 659(b), 666(d), and may seek injunctions to correct dangers that are likely to cause death or serious injuries before utilization of the Act's normal

enforcement procedures would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine. 29 U.S.C. 666(e).

If an employer wishes to contest the citation or the proposed penalty, he must notify the Secretary within 15 working days; in the absence of such notice, the citation and assessment, as proposed, become final. 29 U.S.C. 659(a). Upon the filing of an employer contest, an evidentiary hearing is held before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory agency independent of the Secretary. 29 U.S.C. 659 (c), 661. At this hearing, conducted pursuant to the Administrative Procedure Act, 5 U.S.C. 554, the burden is on the Secretary to prove the elements of the alleged violation, and the judge is empowered to affirm, modify, or vacate the citation, abatement requirement, or proposed penalty, giving due consideration to "the size of the business of the employer * * *, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(i). The judge's decision becomes the Commission's final order unless within thirty days a Commissioner directs that it be reviewed. 29 U.S.C. 659(c), 661(i).

If review is granted, the Commission's order becomes final unless the employer timely petitions for

judicial review in the appropriate court of appeals.[1] 29 U.S.C. 660. The Secretary similarly may seek review of Commission orders, 29 U.S.C. 660(b), but in either case "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). If the cited employer fails to contest a citation or to petition for review, the Secretary is empowered to ensure abatement by seeking a summary judicial decree, enforceable by contempt, in the court of appeals. 29 U.S.C. 660(b).

2. THE FACTS

Petitioner Frank Irey, Jr., Inc. is a large construction contractor which in 1971 and 1972 was engaged in digging trenches in Morgantown, West Virginia, under a contract that expressly required it to comply with trenching safety standards of the Act and that incorporated soil tests clearly indicating that most worksite soil was unstable (Pet. App. 2b–3b, 3d–5d, 7d–8d, 10d–11d). In November 1971 a state safety inspector observed petitioner's employees working in a deep trench whose soft sides were thoroughly wet, cited petitioner both orally and in writing for failing to protect against such "extremely dangerous" conditions, and informed petitioner's job

[1] The period for abatement of the violation runs from the date that the Commission's order becomes final, and a petition for judicial review does not suspend the abatement requirement unless a stay is granted by either the Commission or the court of appeals. 29 U.S.C. 660(a); 29 C.F.R. 2200.92.

superintendent that the trench had been dug in hazardous material rather than in safe rock-like shale (Pet. App. 3b, 3d–4d, 8d, 10d). On January 11, 1972, petitioner's employees were working in another deep trench near the previous one, under the direction of the same job superintendent, when a side made of soft wet material collapsed, killing one worker (Pet. App. 2b–3b, 5d–9d, 10d–11d).

As a result of this fatality, a federal inspector visited the worksite and cited petitioner for a willful violation of the Act's trenching safety standards and six other violations.[2] The Secretary proposed a $7,500 civil penalty for the violation and ordered the violation abated immediately (Pet. App. 2b, 4b, 1d–2d). Petitioner timely contested all seven violations and abatement requirements, contending primarily that its superintendent had been under the good faith although mistaken belief that the wall of the trench was shale (Pet. App. 3b–4b, 2d, 6d–7d, 10d–11d).

The Administrative Law Judge and Commission rejected petitioner's defense, finding *inter alia* that petitioner "was thoroughly familiar with the requirements of the Act and the [trenching] Standards"; that a willful violation exists where either deliberate violative conduct is established or the employer "was aware that a hazardous condition existed and made no

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[2] See 29 C.F.R. 1926.652(b) and Table P–1, requiring the sides of trenches in "unstable or soft material" to be "shored, * * * sloped, or otherwise supported by means of sufficient strength to protect the employees working within them" and warning that "Non-Homogenous Soils" and "The Presence of Ground Water" create special dangers.

reasonable effort to eliminate [it]"; and that such a violation was present here because petitioner "either had actual knowledge that the material * * * it was excavating was unstable or had knowledge of facts indicating that it had not accurately informed itself of the nature of the soil," although with "the exercise of only slight * * * diligence" it could have discovered the hazard (Pet. App. 1c, 5d, 7d–8d, 12d, 14d, 15d–16d). However, the judge and Commission reduced the proposed penalty for this violation to $5,000, and vacated or significantly reduced several of the other proposed penalties (Pet. App. 1c, 12d, 15d–21d).

Petitioner thereupon sought judicial review in the United States Court of Appeals for the Third Circuit, challenging both the finding of a willful violation and the constitutionality of the Act's enforcement procedures.

3. THE COURT OF APPEALS' DECISION

On review, the court of appeals rejected petitioner's contentions that the Act conflicted with the Sixth and Seventh Amendment, but reversed the administrative finding that petitioner's safety violation was willful and remanded the case to the Commission for further proceedings.[3] The panel unanimously dis-

[3] The court also upheld the Act's provision requiring the employer to initiate a notice of contest, holding that the minimal burden on the employer is little different from that imposed on a party who must answer a complaint within a given time or be subject to a default judgment and that the employer is accorded the opportunity for a hearing before the Secretary's proposed penalty becomes final (Pet. App. 9b). See *National Independent*

(Continued)

missed the contention that the civil penalties authorized by the Act were in reality criminal fines which would necessitate a jury trial under Article III of the Constitution and the Sixth Amendment. The court relied upon "a series of Supreme Court decisions which have validated the position that Congress has a wide range of alternatives available to it for enforcing its legislative policy through administrative agencies" (Pet. App. 7b) and held that congressional intent to create a civil, rather than a criminal, sanction in Section 17 of the Act was clear.

The court also rejected, with one dissent, the claim that the Act's administrative enforcement scheme conflicted with the civil jury trial requirement of the Seventh Amendment, again noting that this Court had upheld legislative decisions to "commit [the] collection [of a penalty] to an administrative office without the necessity of resorting to the judicial power," and that the congressional determination to proceed in such a manner was within its discretion (Pet. App. 8b–9b, n. 11).

On rehearing *en banc* the court again upheld the constitutionality of the civil penalty provisions. The court, which discussed only the Seventh Amendment issue, concluded (with four judges dissenting) upon review of a line of decisions of this Court, that en-

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(Continued)

Coal Operator's Association v. *Kleppe*, No. 73–2066, decided January 26, 1976; *Yakus* v. *United States*, 321 U.S. 414; *McLean Trucking Co.* v. *Occupational Safety and Health Review Commission*, 503 F. 2d 8, 11 (C.A. 4).

forcement actions under the Act were "administrative adjudications," that "[t]he Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage" (Pet. App. 8a).

ARGUMENT

1. The holding of the court of appeals that the penalty provisions of the Occupational Safety and Health Act are civil rather than criminal, and are thus not subject to the Sixth Amendment's jury trial requirement, is in accord with the decisions of the four other courts of appeals that have considered this issue. See, *e.g.*, *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission*, C.A. 10, No. 75–1070, decided January 21, 1976; *Brennan* v. *Winters Battery Manufacturing Co.*, C.A. 6, No. 75–1367, decided December 18, 1975; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F. 2d 990 (C.A. 5), pending on petition for a writ of certiorari, No. 75–746; *Beall Construction Co.* v. *Occupational Safety and Health Review Commission*, 507 F. 2d 1041 (C.A. 8); *American Smelting and Refining Co.* v. *Occupational Safety and Health Review Commission*, 501 F. 2d 504 (C.A. 8). Cf. *Underhill Construction Corp.* v. *Secretary of Labor*, C.A. 2, No. 75–4058, decided November 24, 1975, slip op. 658, n. 10. This holding is correct and is consistent with numerous deci-

sions of this Court. There accordingly is no occasion for further review.

The uniform dismissal by the lower courts of petitioner's Sixth Amendment claim is not surprising in view of this Court's repeated rejection of similar contentions. See *Helvering* v. *Mitchell,* 303 U.S. 391; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U.S. 320; *Hepner* v. *United States,* 213 U.S. 103. These and other cases have resulted in settled law that the status of monetary sanctions is a matter of statutory construction and congressional intent, that the deterrent nature of financial assessments does not render them criminal, and that both criminal and civil sanctions can attach to the same act or omission. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663; *One Lot Emerald Cut Stones* v. *United States,* 409 U.S. 232; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; *Chicago, Burlington and Quincy Railway Co.* v. *United States,* 220 U.S. 559.

Here, the Act expressly denominates the penalties imposed by 29 U.S.C. 666(a)–(d) as civil, and "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word." *United States* v. *J. B. Williams Co., Inc.,* 498 F. 2d 414, 421 (C.A. 2). Moreover, even apart from the unambiguous indication of congressional intent, the Act's penalty provisions are civil when analyzed in light of the factors outlined in *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 168–170. As the Fifth Circuit recently con-

cluded in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra,* 518 F. 2d at 1000–1011: (1) the Act's civil penalties are not disabilities although they do carry a "pocket-book deterrence"; (2) monetary penalties have long served a remedial rather than a punitive function; (3) most violations of the Act do not require a showing of scienter, and civil money assessments are the sole enforcement measures authorized for non-willful violations;[4] (4) Congress could rationally have concluded that civil sanctions would serve the remedial function of "saving * * * life and limb"; and (5) the Act's penalties are not excessive, especially in view of "[t]he remedial functions obviously served" by "improved industrial practices that help to prevent future deaths."

Finally, this Court recently emphasized the legitimacy of civil penalties as an appropriate incentive

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[4] Although the Act provides that "willful" violations of regulations that cause death may be proceeded against either civilly or criminally, the court of appeals vacated the Commission's finding that petitioner had committed a "willful" violation. Thus, petitioner's contention (Pet. 17–20, 21) that it in effect was prosecuted criminally without Fifth and Sixth Amendment safeguards, while erroneous in view of the above discussion, also is not squarely presented by this case. In any event, petitioner's reliance (Pet. 21, n. 12) upon a statement by Senator Williams to demonstrate that Congress intended the Act's willfulness penalties to be solely criminal is misplaced. The Senator's comments referred to provisions of a Senate bill, containing express criminal penalties for *all* willful violations, that did not survive in conference. See Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 265–266, 435, 565–566, 1170–1172, 1194 (1970).

to voluntary compliance[5] with the scheme of a regulatory statute in its discussion of the analogous "civil penalty" provisions of Section 109 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756, 30 U.S.C. 819:

> The importance of § 109 in the enforcement of the Act cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, there is little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Independent Coal Operator's Association v. *Kleppe*, No. 73–2066, decided January 26, 1976, slip op. 12–13.

2. Petitioner's Seventh Amendment challenge similarly does not warrant further review. This contention also has been rejected without exception by the courts of appeals. *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission, supra; Brennan* v. *Winters Battery Manufacturing Co., supra; Lake Butler Apparel Co.* v. *Secretary of*

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[5] The central focus of the Act is to ensure compliance before as well as after a federal inspector arrives. See, *e.g.*, *Brennan* v. *Occupational Safety and Health Commission, supra; REA Express,*

Labor, 519 F. 2d 84, 88–89 (C.A. 5); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra; Beall Construction Co.* v. *Occupational Safety and Health Review Commission, supra.* Those decisions rely upon the repeated pronouncements of this Court that Congress may entrust enforcement of a statute, including the imposition of monetary penalties or their equivalent as an incident to effective regulation, to an administrative tribunal. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1; *Pernell* v. *Southall Realty* 416 U.S. 363; *Curtis* v. *Loether,* 415 U.S. 189; *Block* v. *Hirsh,* 256 U.S. 135.[8]

In *Curtis* v. *Loether, supra,* 415 U.S. at 194, for example, in ruling that either party to an action to recover damages for violation of the housing discrimination provisions of Title VIII of the Civil Rights Act of 1968 has a right to a jury trial, the Court noted that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication * * *." Similarly, in *Pernell* v. *Southall Realty, supra,* 416 U.S. at 383, the Court, although holding that a landlord was entitled to a trial by jury in a suit to recover real property,

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Inc. v. *Brennan,* 495 F.2d 822 (C.A. 2); Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 297–300 (Sen. Saxbe), 471–472 (Sen. Dominick), 853, 856 (House Report) (1970).

[8] *Accord: Katchen* v. *Landy,* 382 U.S. 323; *Lloyd Sabaudo Societa* v. *Elting,* 287 U.S. 329; *Oceanic Steam Navigation Co.* v. *Stranahan, supra; Passavant* v. *United States,* 148 U.S. 214; *Bartlett* v. *Kane,* 16 How. 263.

"assume[d] that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right of possession, to an administrative agency." These cases merely restate the settled rule that the legislature may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury.[7]

A fortiori, Congress may create rights and obligations unknown at common law and establish an expert administrative tribunal to enforce those rights. This is especially so where, as here, the congressional purpose was the swift securing of administrative abatement orders, which are equitable and to which assessed penalties, "if any," 29 U.S.C. 659(a), are ancillary. Both the legislative history and the language of the Act emphasize that Congress was primarily concerned with the elimination of dangers to "life and limb"; the highly discretionary monetary assessment power given to the Secretary merely was but one tool to ensure that such hazards would indeed be removed without delay. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* 301 U.S. at 48–49; *National Independent Coal Operator's Association* v. *Kleppe, supra.*

3. Finally, contrary to petitioner's pervasive assertions (Pet. 6–8, 22–23), the provisions of the Act au-

[7] See, *e.g., Mountain Timber Co.* v. *Washington,* 243 U.S. 219 (workmen's compensation claims); *Block* v. *Hirsh* 256 U.S. 135 (landlord-tenant claims).

thorizing administrative imposition of civil penalties without a jury trial *de novo* do not constitute a radical departure from prior legislation. There presently are several federal statutes permitting an administrative agency to assess such civil penalties [8] and the concept itself has been recognized in federal administrative practice for at least 80 years. *Allman* v. *United States*, 131 U.S. 31, 35; *Oceanic Steam Navigation Co.* v. *Stranahan, supra.*

In sum, petitioner's constitutional claims have been persuasively rejected by every court to hear them and are at odds with controlling decisions of this Court. There is no necessity for further review of the correct decision of the court of appeals.

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[8] See, *e.g.*, 39 U.S.C. 5206, 5603 (Postal Service); 8 U.S.C. 1221(d), 1223(c), 1227(b), 1229, 1253(e), 1281(d), 1284(a), 1285–1287, 1321, 1322(a), 1322(b), 1323(a), 1323(b) (Immigration and Naturalization Service); 12 U.S.C. 1425a(d), 1425b (Federal Home Loan Bank Board); 49 U.S.C. 1678 (Natural Gas Pipeline Safety Act); 30 U.S.C. 819 (Federal Coal Mine Health and Safety Act).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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